Atlantic Paratrans of N.Y.C., Inc. *and* Transport Workers Union of America, AFL–CIO. Case 29–CA–27916

February 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on September 21, 2006, the General Counsel issued the complaint on October 27, 2006, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union certification in Case 29–RC–10316. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(b); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On December 4, 2006, the General Counsel filed a Motion for Summary Judgment. On December 14, 2006, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its contentions in the underlying representation proceeding that dispatchers are statutory supervisors.[1]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment, and will order the Respondent to bargain with the Union.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a domestic corporation with its principal office and place of business located at 58-75 Maurice Avenue, Maspeth, New York, has been an independently operated subsidiary of Atlantic Express Transportation Group, providing transportation services to disabled individuals, and those individuals who, due to a physical ailment or impediment, cannot

[1] The Respondent's answer denies that the Union is a labor organization, denies that the Union demanded bargaining, and asserts as an affirmative defense that the Union is excluded from coverage under the NLRA, and that the Board therefore lacks jurisdiction. The General Counsel moves to strike those portions of the Respondent's answer as frivolous, asserting that there are no grounds to support these denials, and that the Respondent answered falsely, denying allegations that it knew to be true.

In its opposition to the General Counsel's motion, the Respondent argues that it had a legitimate ground on which to deny the Union's labor organization status, because of the "inconsistency" as to the identity of the Union that was created when it received a December 15, 2005 request for information from the Union that indicated that the "TWU International" and "Local 252, TWU" had received carbon-copies of the letter, and when an employee filed an unfair labor practice charge alleging that he was terminated because of his support for "Local 100 TWU." The Respondent further argues that because of the above circumstances, it did not know the precise nature of the party speaking on behalf of the unit in the requests for bargaining, and therefore could not admit in its answer that a request to bargain was made by the designated representative. The Respondent then offers to amend its answer to admit the previously-denied allegations.

There is no possibility of confusion or inconsistency with respect to the identity of the certified exclusive collective-bargaining representative. The Respondent stipulated in the underlying representation proceeding that the Transport Workers Union of America was a labor organization within the meaning of the Act. On December 28, 2005, the certification of representative was issued in the name of "Transport Workers Union of America, AFL–CIO." Two requests to bargain were made of the Respondent on behalf of the Transport Workers Union. With respect to the Respondent's denial of the Union's request for bargaining, the General Counsel has submitted with his motion copies of this letter evidencing the Union's request. The Respondent has not disputed the authenticity of that correspondence, or asserted any argument whatsoever in support of its denial.

Sec. 102.21 states in pertinent part "[i]f an answer . . . is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the answer had not been served." In light of the uncontroverted facts presented above, and the Respondent's offer to amend its answer to admit the denied facts, we find that the denials in the Respondent's answer with respect to the Union's status as a labor organization and the Union's demands for bargaining are frivolous, and we grant the General Counsel's motion to strike these portions of the Respondent's answer. See *Superior Industries International, Inc*., 295 NLRB 320 (1989).

Inasmuch as the Respondent is willing to amend its answer in relevant part, Chairman Battista finds it unnecessary to pass on the issue of whether the original answer was frivolous.

utilize public transportation, throughout the five boroughs of New York City.

Annually, in the course and conduct of its business operations described above, the Respondent derived revenues in excess of $250,000 and purchased and received at its New York facility goods and services valued in excess of $5000 directly from points located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held April 1, 2005, the Union was certified on December 28, 2005, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time dispatchers, excluding all other employees, managers and supervisors as defined in Section 2(11) of the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated December 15, 2005 and July 31, 2006, the Union requested the Respondent to bargain with it and to commence negotiations for a first contract. About August 30, 2006, by letter, the Respondent informed the Union that it would not bargain because it refused to recognize the Union as the bargaining representative of its dispatcher employees. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on August 30, 2006, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist from failing and refusing to recognize and bargain with the Union, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Atlantic Paratrans of N.Y.C., Inc., Maspeth, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Transport Workers Union of America, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the agreement in a signed agreement:

> All full-time and regular part-time dispatchers, excluding all other employees, managers and supervisors as defined in Section 2(11) of the Act.

(b) Within 14 days after service by the Region, post at its facility in Maspeth, New York, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Re-

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2006.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 28, 2007

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Transport Workers Union of America, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time dispatchers, excluding all other employees, managers and supervisors as defined in Section 2(11) of the Act.

ATLANTIC PARATRANS OF N.Y.C., INC.